trol Ordinance; that whether or not he was so could only have been determined after a trial; that there had been no such trial, that if there had been he might have satisfied the court that he was indeed a protected tenant, in which event he would have been a protected tenant until his death and accordingly no judgment would have been entered against him, and that following his death the widow and son would have been statutory tenants and the plaintiff would have had no right to evict them unless they contravened the Ordinance. Finally, they said that the law required the plaintiff to serve notice of the *proceedings* on both of them before judgment was obtained and that if they had been served they would have elected to defend the action by consenting to be parties to the proceedings, and that without a trial their rights to the premises would not be known, and that accordingly the plaintiff's application should be dismissed.

Over the objection of the widow and son, the learned judge on November 14, 1979, made an order ("the second order") granting the plaintiff leave to issue a writ of possession to recover possession from the widow in both her representative and personal capacities, and from the son.

It is from this order that this appeal has been lodged. (There is no appeal from the first order).

We are of the opinion that this appeal should be allowed and that the question of costs should be decided at the end of the trial which we think will eventually ensue.

This matter has become procedurally confused, due in the main to the fact that the learned judge has not kept clearly in mind that the widow has two capacities and whether and when she appeared in one or other capacity. Also, there was some uncertainty as to who has brought this appeal. The notice of appeal at page 35 shows that it is the widow in her representative capacity who is the appellant. There is nothing on the record to show that this appeal is by the widow in her personal capacity or by the son. Mr. Reddy in answer to our question said that he appeared before us representing the estate. This plainly is consistent with his stand throughout that the widow personally and the son have never been parties to the action, that any judgment obtained by the plaintiff cannot bind either of them as neither, it was said, could be affected by an order for possession, as neither had had an opportunity of being heard in the proceedings *in which the order was made.*

To get out of the confusion and in the interest of justice we should in our judgment allow the appeal — so as to enable the widow in her personal capacity and her son to take advantage of Order 12 rule 25 which reads:

"25. Any person not named as a defendant in a writ of summons for the recovery of land may by leave of a court or a judge appear and defend on filing an affidavit showing that he is in possession of the land...."

In *Tan Joo Eng (m.w.)* v. *Siang Heng Co. Ltd. & Ors.*,[1] Whyatt C.J. said at page 19 that, although it might be said that the wording of this rule appears to contemplate that the application for leave should be made before judgment has been given, "it was held in *Minet* v. *Johnson*[2] that it is wide enough to include an application made *after* judgment has been signed and even *after* execution has been issued."

Only by allowing the widow in her personal capacity and her son to come in as defendants may their rights if any to possession of the premises be fully investigated and properly determined.

Accordingly we set aside the second order appealed from, and substitute therefor an order dismissing the plaintiff's application in the summons-in-chambers, and giving the widow in her personal capacity and the son to make application, if so advised, under Order 12 rule 25, for leave to appear and defend, such application to be made within thirty days of this judgment.

Order accordingly.

Solicitors: *Yong & Co.*

OH KENG SENG v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) & Wan Suleiman F.J.) March 3 & July 14, 1980]
[Kuala Lumpur — Federal Court Criminal Appeal No. 39 of 1978]

Criminal Law and Procedure — Charge of sedition — Charge — Speech alleged to be seditious should be set out in charge — Amendment of charge — Sedition Act, 1948 (Revised 1969), ss. 3(1) and 4(1)(b).

This was an appeal from the decision of the High Court reported in [1979] 2 M.L.J. 174. On the appeal the question was raised whether the charge was proper.

Held: (1) in a charge of sedition it is not necessary to set out the particular words of the law defining sedition in the charge. What the law requires is that the speech or those parts of the speech alleged to be seditious should be set out in the charge and then it is for the court to decide having considered all the evidence whether those words mentioned are seditious;

(2) in this case the appellant knew full well what had been alleged against him, as his defence indicated;

(3) although the amendment to the charge was superfluous, the trial judge had power to amend the charge and the statutory requirements were complied with, so that the appellant was in no way prejudiced.

Cases referred to:-

(1) *Yoh Meng Heng* v. *Public Prosecutor* [1970] 1 M.L.J. 14.

(2) *Public Prosecutor* v. *Oh Keng Seng* [1977] 2 M.L.J. 206, 210.

FEDERAL COURT.

Yeap Ghim Guan for the appellant.

Mohamed Noor bin Haji Abdullah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): We dismissed this appeal and affirmed the conviction and sentence imposed by the learned trial judge. However an important point of law was raised during the hearing which requires a ruling by this court.

This appeal has a rather chequered history. Since the original charge preferred against appellant was the

object of considerable misgivings on the part of the learned trial judge we should perhaps set it down in full.

Appellant was charged before the judge in the High Court, Seremban as follows: —

"That you on the 23rd day of June, 1972 between 8.40 p.m. and 9.35 p.m. at the Padang Besar, Tampin, in the District of Tampin, in the State of Negri Sembilan, uttered seditious words in Mandarin (the full translation of the text of which is attached as Schedule 'A' to this charge) and that you have thereby committed an offence under section 4(1)(b) of the Sedition Act 1948 (Revised 1969) and punishable under section 4(1) of the said Act."

At the close of the prosecution case on September 7, 1976, he was acquitted and discharged, the learned judge being of the view that the speech was not seditious. On appeal by the Pub osecutor this court set aside the order of acquitt d directed that the appellant be called upon to make his defence.

In his defence, to cite the very words of the trial judge, "the accused did not seriously deny that he had made the speech which was the subject-matter of the charge. He said that his speech was fair criticism of Government policies, that he had no intention of causing racial trouble and that he never advocated to the people that they should take the law into their own hands." In short he relied on the defence provided by section 3(2) of the Sedition Act.

At the close of the defence case, Mr. Yeap, counsel submitted that the charge against the appellant was improper and defective because it did not contain particulars alleging under what *category of seditious tendency* the accused had contravened the Sedition Act, 1948. He cited the case of *Yoh Meng Heng* v. *Public Prosecutor*[1] in support.

In that case, which was an appeal from the judgment of the Sessions Court, the second charge (the one alleged to be defective) read: —

"That you on April 18, 1960 at about 6.30 a.m. at an unnumbered hut at Bertam Estate, Kepala Batas, in the District of Butterworth, in the State of Penang, were found, without lawful excuse, to have in your possession a subversive document, to wit a document titled 'Is Malaya a Democratic Country? Is there Freedom of Assembly, Association, Speech, Publication, Strike, Demonstration etc.' and that you have thereby committed an offence punishable under section 29(1) of the Internal Security Act No. 12 of 1960."

The appellant in that appeal was apprehended, while he was with a group of persons painting some writings on the roadside. On the next day, an inspector took him to his house where in a room, which his mother, a prosecution witness, admitted, was occupied by him, the publication entitled "Quotations from Chairman Mao" specified in the first charge and the alleged subversive documents were found. Translations were made of the pamphlets (P2A) and produced in court. This was the only evidence adduced by the prosecution. It was not stated in the charge just how the pamphlets were classified as coming within the definition of "subversive document" as defined in section 29 of the I.S.A.

Ong J. (as he then was) went on to set out the definition of subversive document in section 29(3) of the I.S.A.: it being defined as any document having in part or in whole a tendency —

(a) to excite organised violence against person or property in the Federation; or

(b) to support, propagate or advocate any act prejudicial to the security of the Federation or the maintenance or restoration of public order therein or inciting to violence therein or counselling disobedience to the law thereof or to any lawful order therein; or

(c) to invite, request or demand support for or on account of any collection, subscription, contribution or donation, whether in money or in kind, for the direct or indirect benefit or use of persons who intend to act or are about to act, or have acted, in a manner prejudicial to the security of the Federation or to the maintenance of public order therein, or who incite to violence therein or counsel disobedience to the law thereof or any lawful order therein.

The learned judge then referred to *Ratanlal's* Law of Crimes which, he remarked, shows that specimen charges relating to sedition set out particulars by reference to the particular words of the law defining what is a seditious tendency. He added that the charge in that appeal was embarrassing to the appellant in not having specified in which manner they (the documents) were alleged to be subversive and therefore the appellant was prejudiced in his defence.

He therefore set aside the order of conviction and ordered a retrial.

We should point out that the Sessions Court President in reading the offending document came to a finding that the pamphlets were subversive "in that they have the tendency to excite organised violence and counselling disobedience to law" and therefore coming within the ambit of section 29(3)(a) & (b) of the I.S.A., 1960 but the learned appellate judge was unable to find evidence of such tendency in that document. Perhaps this view of the document had some considerable effect in persuading Ong J. to take the course which he did.

In the present appeal following the decision in *Yoh's* case the learned judge remarked that the charges against the appellant are on somewhat similar lines as section 29 of the I.S.A., 1960. In charging the appellant with uttering seditious words, he said, the charge did not specify the *particular category of seditious tendency* as defined in section 3(1) which is violated by those words. He then held that the appellant had been prejudiced and embarrassed in making his defence for he was not in a position to know exactly what he was required to rebut in defence. In consequence he ruled that the charge was defective for want of essential and material particulars, and therefore the charge as framed could not be sustained.

It is not strictly speaking correct that this point regarding the charge was only raised for the first time at the close of the defence case but *Yoh's* case was indeed first cited on this occasion. However the reasoning behind what the learned trial judge then remarked seem to us, with great respect, to indicate a remarkable confusion of thought, for his Lordship said, "Now if I had been exercising an appellate juris-

diction I would have no hesitation in dismissing the charge forthwith or at least in ordering a retrial. However, sitting in the first instance I have to view this case in a different light."

As we have alluded to before this point had been raised in a somewhat different form by learned defence counsel at the commencement of the prosecution case (See *Public Prosecutor* v. *Oh Keng Seng*[2]) and we quote: —

"Counsel for the defence objected to the whole speech being included in the charge on the ground that the defence would not be in a position to know whether the whole speech was alleged to be seditious or only part of it. He said that it was important for the defence to know exactly which parts of the speech were alleged to be seditious and therefore only those parts should be incorporated in the charge. The learned trial judge overruled this objection, as he thought there was nothing improper in annexing the whole speech to the charge, for he said (this point was conceded by both counsel before us) the speech had to be considered as a whole in order to decide whether it was seditious or not. However, at the end of the prosecution case the learned judge directed the Deputy Public Prosecutor to underline (and the Deputy Public Prosecutor complied) the particular passages which the prosecution said were seditious."

From this passage it is abundantly clear that the learned judge was then satisfied with the propriety of the charge.

Let us now examine the specimen charge in *Ratanlal's* Law of Crimes (21st Edition at p. 322) which had apparently persuaded Ong J. to hold that the charge in *Yoh's* case was defective for want of sufficient particulars of a certain sort. The specimen charge reads: —

"That you, on or about the ..... day of ..... at ..... by writing (or spreading) the words (*mention them*) brought (or attempted to bring) into hatred or contempt (or executed or attempted to execute disaffection towards) the Government established by law in India, and thereby committed an offence under section 124A...."

(We have omitted portions irrelevant for our purpose).

We note that though the objection raised by counsel regarding the charge led to the offending passage of appellant's speech (the full translation referred to as Schedule "A" had formed part of the original charge) being underlined by the learned deputy at the instance of the trial judge, the former had narrowed these down to two passages in the first appeal before us.

With respect, we think that Ong J. erred in *Yoh's* case in requiring *the particular words of the law defining what is a seditious tendency* to be set out in the charge, and it follows that we hold that the learned trial judge in this case was equally in error in requiring the same particulars to be set out in the instant appeal. The offending passages *of the speech,* in our considered opinion, (and *Ratanlal's* specimen charge required only the words to be mentioned), had been sufficiently indicated, the appellant was in no way embarrassed or prejudiced in his defence.

What the law requires is that the speech or those parts of the speech alleged to be seditious should be set out in the charge, and then it is for the court to decide having considered all the evidence, whether those words mentioned are seditious.

We should add that the appellant knew full well all the time what had been alleged against him, as his defence indicates.

Since the amendment to the charge, though superfluous, was something within the power of the trial court under section 158 of the Criminal Procedure Code and the requirements of section 159 had also been complied with, the appellant was in no way prejudiced. Accordingly we dismissed the appeal and affirmed the conviction and sentence imposed.

Appeal dismissed.

Solicitors: *Yeap & Co.*

CHUNG SHIN KIAN & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Yusoff J.) April 11, 1980]
[Kuching — Criminal Appeal No. K. 6 of 1979]

Merchandise Marks — Trade description — Tailoring business — Various types of 'Texwood' labels, tags, jeans and jackets found on premises — Products different in texture and weave pattern from actual 'Texwood' samples — Trade Description Act, 1972 (Act 87), ss. 3(1)(a), 4(1), 5, 6, 9 & 16.

Partnership — Offence against Trade Description Act, 1972 — Premises raided — Absence of one partner during raid of premises — Liability of absent partner — Partnership Act, 1971, s. 14 — Interpretation Act, 1967, s. 3.

The facts in this case revealed that acting on information received, the officers from Trade Description Department raided the accused's shop at No. 275 Padungan Road, Kuching. It was a tailor shop and at that time there were ten workers engaged in stitching materials into jeans and jackets. The premises were searched and the officers discovered various types of "Texwood" labels and tags, Texwood jeans and jackets both finished and unfinished. The exhibits were seized and sent to the Chemist Department for analysis.

During the raid only the first accused was present in the shop. The second accused, a partner, was not present but later in the evening he accompanied the first accused to the Department of Trade Description where his statement was recorded.

The charge preferred against both accused was that in the course of their business they did apply a false trade description name "Texwood" to ten pieces of jackets and fifty seven pairs of jeans. The learned magistrate found that garments labelled with "Texwood" were products of Texwood Limited established in Hong Kong. They were also the proprietors of the trade mark registered in Sarawak and that within the meaning of section 4(1) of the Trade Description Act, they were the person by whom the goods were manufactured or produced. Samples of their products were sent to the Chemist for comparison with the seized products. The Chemist's report indicated that both products were different in texture and weave pattern. The learned magistrate found that the description on the seized products was false to a material degree. Both accused were convicted and sentenced for an offence under section 5(1)(a) of Trade Description Act, 1972. They appealed.

Held: (1) dismissing the appeal of the first accused, the learned magistrate had properly directed himself on the facts and law of the case and he had come to the correct conclusion.

(2) allowing the appeal of the second accused, there was no evidence showing that the second accused was implicated in the offence except that he was a partner of the shop. As section 3 of the Trade Description Act does not include every partner in a firm of partnership and section 14 of the Partnership Act 1971 does not provide for joint liability in criminal proceedings, the second accused's appeal is allowed and his conviction quashed.